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No. 306

In the Supreme Court of the United States

OCTOBER TERM, 1958

MURIEL DODGE NEEMAN (Formerly MURIEL DODGE),
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Tax Court (R. 29a-38a)[1] is reported at 26 T.C. 864. The *per curiam* opinion of the Court of Appeals (Pet. 33-34) is reported at 255 F. 2d 841.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1958. (Pet. 35). The petition for a writ

[1] Record references are to the Appendix to the taxpayer's brief in the Court of Appeals.

of certiorari was filed on August 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below correctly held that alimony payments received by the taxpayer during the taxable years 1945 to 1948, inclusive, constituted taxable income to taxpayer under Section 22(k) of the Internal Revenue Code of 1939, without violating any provision of the Constitution of the United States.

STATUTE INVOLVED

The pertinent provisions of Sections 22 and 23 of the Internal Revenue Code of 1939 are set out in the Appendix, *infra*, pp. 10-13.

STATEMENT

The facts, as stipulated (R. 22a-28a) and found by the Tax Court (R. 30a-34a), may be summarized as follows:

In a previous decision, rendered September 29, 1949, the Tax Court held the taxpayer accountable under Section 22(k) of the Internal Revenue Code of 1939 for sums received from her former husband, Horace E. Dodge, as alimony for 1942 and 1943. That decision was affirmed on appeal, and certiorari was denied. See *Neeman v. Commissioner*, 13 T. C. 397, affirmed *per curiam*, 200 F. 2d 560 (C. A. 2d), certiorari denied, 345 U. S. 956. (R. 22a, 31a.)

In that case, the Tax Court found (*inter alia*) (R. 31a-32a):

(1) Taxpayer and Dodge were married May 17, 1928.

(2) They entered into an agreement on August 4, 1933, which provided for periodic payments by Dodge to taxpayer; that he was to pay all United States and state income taxes which she might be required to pay because of such alimony payments; that such provision for payment of taxes by him was not binding on the Commissioner of Internal Revenue and could not prevent him from determining taxes due from taxpayer based on such alimony payments.

(3) That taxpayer and Dodge entered into another agreement on October 23, 1939, making certain changes in the original agreement of August 4, 1933, increasing the payments thereunder, and providing for approval of the agreements in the pending divorce proceedings between the parties.

(4) That taxpayer and Dodge were divorced by a final decree of the Circuit Court, Wayne County, Michigan, dated October 26, 1939, which approved, ratified, and confirmed the above-mentioned agreement of August 4, 1933, as amended by the agreement of October 23, 1939.

Taxpayer received from Dodge $15,000 for each of the years 1945, 1946 and 1947, and $8,750 in the year 1948 in accordance with the agreements and divorce decree. (R. 32a.)

Dodge filed United States income tax returns for the years 1945 through 1948. He had gross taxable income for those years varying from a minimum of

$3,953.43 in 1945 to a maximum of $7,556.55 in 1948; and he had deductions in excess of those amounts. Dodge, however, received tax-exempt interest amounting to more than $145,000.00 in each of the years 1945 to 1948, inclusive, and the specific source of funds used by him to make alimony payments to taxpayer is unknown. (R. 32a-33a.)

The parties in the present proceeding are identical with the parties in the earlier proceeding. The matters and issues raised in the present proceeding are identical with those raised in the former proceeding except that taxpayer has (1) not alleged she was entitled to an exemption as the head of a family, and (2) in the present proceeding she has raised certain constitutional questions that were not specifically pleaded in the earlier case, and also a question as to the source of the payments that Dodge made to her. (R. 33a-34a.) The Tax Court held that the doctrine of collateral estoppel did not operate to preclude consideration of such questions, and after considering them, it sustained the Commissioner's determination holding taxpayer accountable for income taxes on the alimony payments received by her. (R. 34a-38a.) The Court of Appeals affirmed on the opinion of the Tax Court. (Pet. 33-34.)

ARGUMENT

The decision of the court below, affirming the decision of the Tax Court, is clearly correct. There is no conflict of decisions or other reason for further review.

Section 22(k) of the Internal Revenue Code of 1939, as added by the Revenue Act of 1942 (Appendix, *infra*), provides that, in the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments received subsequent to such decree in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of the wife.

In the prior proceeding involving the years 1942 and 1943, the Tax Court held the taxpayer accountable under Section 22(k) for alimony received from Dodge for those years. See *Neeman* v. *Commissioner* 13 T. C. 397, affirmed *per curiam*, 200 F. 2d 560 (C. A. 2d), certiorari denied, 345 U. S. 956. And, under the doctrine of collateral estoppel (*Commissioner* v. *Sunnen*, 333 U. S. 591; *United States* v. *International Building Co.*, 345 U. S. 502), that decision operates to preclude any further consideration of the matters and issues that were actually raised and decided in the earlier proceeding even though we are here dealing with other and later tax years (1945 through 1948). The fundamental question which the taxpayer now attempts to present to this court (Pet. 4) is whether alimony paid to her by her former husband (Dodge) out of tax-exempt income or capital can constitutionally be taxed. That is the only question which this Court need now consider here. *Helvering* v. *Taylor*, 293 U. S. 507, 511.

In the instant proceeding, the Tax Court held that the doctrine of collateral estoppel would not preclude review of this question (R. 34a), but concluded (R. 38a) that there was a failure of proof by taxpayer as to the source of the payments made to her by Dodge. Indeed, the parties stipulated (R. 27a) that the specific source of funds used by Dodge to make the alimony payments was unknown, and, in the circumstances, there is lacking the requisite factual basis for support of taxpayer's contention. However, the Tax Court did not rest its decision entirely upon failure of proof. It went on to hold (R. 35a-38a) that the constitutionality of Section 22(k) does not depend upon whether the person paying the alimony had or did not have taxable income with which to pay it, but rather depends upon whether alimony is income to the recipient within the Sixteenth Amendment and whether the statute is so arbitrary and unjust as to violate the Fifth Amendment.

The Tax Court relied (R. 35a, 37a) upon three cases (*Mahana* v. *United States*, 88 F. Supp. 285 (C. Cls.), certiorari denied, 339 U. S. 978; *Fairbanks* v. *Commissioner*, 191 F. 2d 680 (C. A. 9th), certiorari denied, 343 U. S. 915; and *Twinam* v. *Commissioner*, 22 T. C. 83) in each of which the constitutionality of Section 22(k) was explicitly upheld. Cf. *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426; *Bacon* v. *Wells*, 289 U. S. 670. We know of no decision to the contrary. Moreover, the validity of the statute has been postulated by all the courts which have dealt with it (*Fairbanks* v. *Commissioner*, *supra*, p. 681), and there have, of course, been many cases

under the statute which have been decided by the courts since it first became effective in 1942.

The taxpayer, however, attempts to distinguish the *Mahana*, *Fairbanks* and *Twinam* cases on the ground that the payments there were made out of taxable income. (Pet. 12.) Taxpayer says that the instant payments must have been made to her by Dodge out of tax-exempt income or capital since he did not have enough taxable income from which to make them, and that it would violate the Sixteenth and Fifth Amendments to the Constitution if Section 22(k) were applied so as to subject her to taxation in such circumstances. (Pet. 10-11, 20, 23, 25, 30.) Taxpayer also contends that, to the extent paid out of tax-exempt income, her alimony is immune from taxation under Section 22(b)(4) of the 1939 Code (Appendix, *infra*) and the Tenth Amendment to the Constitution. (Pet. 23-24.) She argues that she can in no event be taxed on this alimony because Dodge had no tax burden in the first place, and hence there was no net taxable income to be shifted over to her. (Pet. 20, 30.)

The short answer to these contentions is that the statute operates to tax the wife on alimony received by her without regard to the source from which the husband makes the payments (*Luckenbach* v. *Pedrick*, 214 F. 2d 914 (C. A. 2d); *Albert R. Gallatin Welsh Trust* v. *Commissioner*, 16 T. C. 1398, affirmed *sub nom. Girard Trust Corn Exchange Bank, Trustee*, v. *Commissioner*, 194 F. 2d 708 (C. A. 3d); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 84 (1942-2 Cum. Bull.

504, 568);[2] and there is nothing unreasonable or arbitrary about such treatment. *Gould* v. *Gould*, 245 U.S. 151, cited by the taxpayer (Pet. 8, 17, 18), did not deal with the scope of the term "income" as used in the Sixteenth Amendment, and only purported to construe the definition of "net income" contained in Section II A and B of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 166. The law was amended in 1942 so as to specifically change the result in the *Gould* case, and hence that case has no application here. Under the law as so changed, (Section 22(k) of the 1939 Code), the payments to the wife are treated as income to her in the same sense that salaries or rents would be treated as income, and it makes no difference whether such items are paid out of earnings, capital, or tax-exempt income of the payor. In any case, they are income to the recipient.

Here, Dodge was the owner of the tax-exempt income, and that exemption (Section 22(b)(4)) would not extend to the taxpayer even if he made the payments in question to her from that source. Cf.

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[2] S. Rep. No. 1631 reads in part as follows (p. 84 (1942-2 Cum. Bull. 504, 568)):

> The full amount of periodic payments received under the circumstances described in section 22(k) is required to be included in the gross income of the recipient whether such amounts are derived, in whole or in part, from income received or accrued by the source to which such payments are attributable. Thus, it matters not that such payments are attributable to property in trust, to life insurance, endowment, or annuity contracts, or to any other interest in property, or are paid directly or indirectly by the obligor husband from his income or capital. * * *

Norfolk Nat. Bank of C. and T. v. *Commissioner*, 66 F. 2d 48 (C. A. 4th); *Commissioner* v. *Meyer*, 104 F. 2d 155 (C. A. 2d). Certainly, Dodge could not immunize persons to whom he paid salaries or rents, and the instant situation is not basically different. By taxing this alimony to taxpayer, the Commissioner has not deprived Dodge of any exemption to which he may be entitled under Section 22(b)(4), relating to tax-exempt interest; and neither his constitutional nor statutory rights have been impaired. Indeed, taxpayer has no just ground to complain since she has received and enjoyed the alimony which is being taxed to her.

Finally, taxpayer says (Pet. 28-29) that Dodge is contractually obligated to pay her taxes, and this appears to be so (R. 31a). However, such a private agreement constitutes no ground for relieving her from tax. Moreover, this point was decided against taxpayer in the prior proceeding. (13 T. C. at p. 399.)

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

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SEPTEMBER, 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(4) [as amended by Sec. 112(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798; and by Sec. 11(d) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *Tax-free interest.*—Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or (B) obligations of a corporation organized under Act of Congress, if such corporation is an instrumentality of the United States; or (C) the obligations of the United States or its possessions. Every person owning any of the obligations enumerated in clause (A), (B), or (C) shall, when so required by regulations prescribed by the Commissioner with the approval of the Secretary, submit in the return required by this chapter a statement showing the number and amount of such obligations owned by him and the income received therefrom, in such form and with such information as such regulations may prescribe. In the case of obligations of the United States issued after September 1, 1917 (other than postal savings certificates

of deposit to the extent they represent deposits made before March 1, 1941) and in the case of obligations of a corporation organized under Act of Congress, the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof as amended and supplemented, and shall be excluded from gross income only if and to the extent it is wholly exempt from the taxes imposed by this chapter;

* * * *

(k) [as added by Sec. 120(a) of the Revenue Act of 1942, *supra*] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such a divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the

amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife (or if more than one such installment payment for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the taxable year in which it is received. (In cases where such periodic payments are attributable to property of an estate or property held in trust, see section 171(b).)

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(u) [as added by Sec. 120(b) of the Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*— In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

(26 U.S.C. 1952 ed., Sec. 23.)

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